

No. 87-653

Supreme Court, U.S.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1987

GOVERNMENT OF THE VIRGIN ISLANDS,
v. *Petitioner,*

JDS REALTY CORPORATION, formerly known as
West Indies Corporation,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit

REPLY BRIEF

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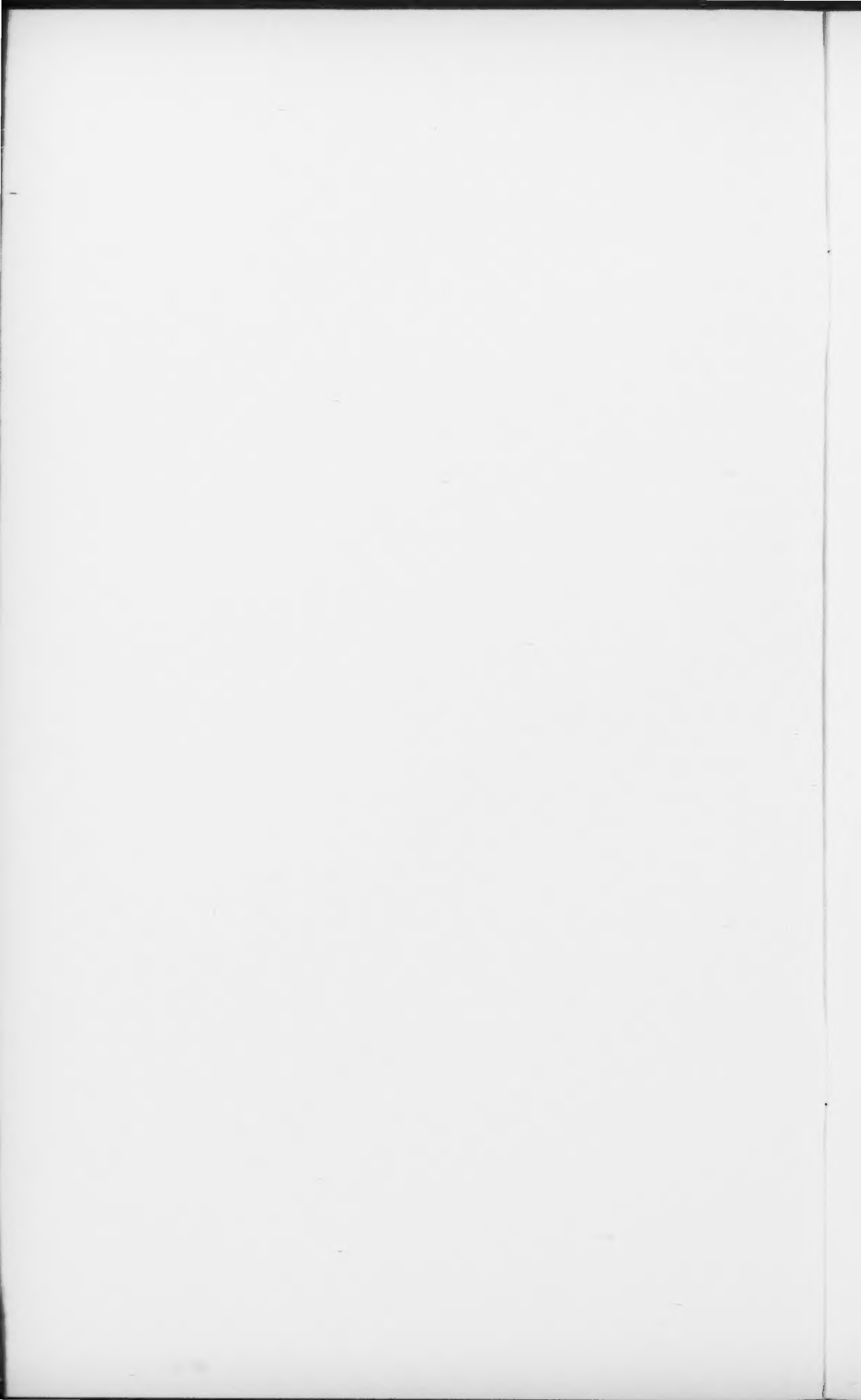


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REPLY BRIEF

Respondent, JDS Realty Corporation ("JDS"), has urged this Court to deny the petition for a writ of certiorari, principally on the grounds of alleged mootness. The issue presented by the petition, however, is not moot: because of the decisions of the courts below, the Virgin Islands Government cannot enact and enforce certain excise tax legislation. Because of the decisions of the courts below, the Virgin Islands Government must process, and perhaps pay, \$4.5 million, plus interest, in claims seeking refunds of taxes paid under the challenged legislation; in addition, the Virgin Islands Government may not proceed to enforce collection of excise taxes assessed but not paid at the time of the district court's decision.

And, because of the decisions of the courts below, the Virgin Islands, while denied the constitutional rights of Statehood, is nonetheless subjected—now and in the future—to the full rigors of the Commerce Clause, as if it were a State.

Petitioner readily acknowledges that, regardless of the outcome of this petition, JDS will not receive a refund of the approximately \$1.5 million it paid in excise taxes from 1977 to 1980 under the challenged excise tax statute. Were that the only measure of this Court's authority to entertain the case, JDS' mootness argument might be entitled to greater weight. However, JDS also sought in the courts below a declaration that the Virgin Islands excise tax was unconstitutional and that the Virgin Islands was subject to the limitations of the Commerce Clause. (Pet. App. 28a-29a). The court of appeals, while affirming the dismissal of JDS' damages claim (Pet. App. 30a-31a), nevertheless upheld JDS' constitutional challenge to the excise tax. (Pet. App. 4a). In both courts below, and now again to this Court, JDS makes an argument broader than a simple claim to a refund. Indeed, JDS baldly asserts that the Virgin Islands cannot be permitted to possess "the unregulated power to impose discriminatory taxes." (Resp. Br. 4).¹

This case, then, is far more than a refund case—it was brought and maintained as a direct assault, under the U.S. Constitution, on the taxing authority of the Virgin Islands Government. JDS sought not only a refund of money paid, but a judicial declaration that future assessments against it—under an excise tax regime al-

¹ The irony of the present mootness claim, of course, is that, in the court below, JDS resisted any argument to vacate the district court decision because of the absence of compensable damages. (Pet. App. 1a-11a). If the controversy is moot, it was also moot below and the court of appeals decision, as well as the district court decision, should be vacated. See *Great Western Sugar Co. v. Nelson*, 442 U.S. 92 (1979) (per curiam).

legedly favoring local commerce—could not be sustained. The decisions of the courts below uphold JDS' challenge to past *and* future tax regimes. As the Virgin Islands and its supporting *amicus*, the Government of Guam, have argued, that decision is fundamentally flawed on its merits. Simply stated, JDS' failed refund claim does not moot the decision below, which effectively enjoins future tax assessments and enforcement under the prior Virgin Islands statute and precludes enactment of similar tax regimes. See *Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115 (1974).

Nor does the Virgin Islands' reluctant amendment of its excise tax statute—in order to allow its taxing authorities to continue to collect taxes in the face of the district court's ruling—moot the issue presented here. As noted in the petition (Pet. 7 n.5), that amendment does not eliminate the underlying issue of the constitutional propriety of a tax which allegedly favors local commerce. See *Brown v. Liberty Loan Corp.*, 539 F.2d 1355, 1358 (5th Cir. 1976), *cert. denied*, 430 U.S. 949 (1977). As a direct consequence of the decisions below in this case, the Virgin Islands has been enjoined from enforcing the legislation of its preference under powers duly delegated by the Congress. (Resp. App. 1a-3a). Moreover, by judicial fiat, the Virgin Islands cannot again defend the constitutionality of its prior statute in other refund cases: the district court has opined that it will not tolerate "numerous suits by Virgin Islands taxpayers against the same Defendant on the same issue." (*Id.*).

Until the underlying precedent in this case is overturned, the judicial prohibition against enforcement of territorial tax legislation will remain in place. Review is thus necessary to enable the Virgin Islands to assert its territorial prerogatives to enact tax legislation and to develop its territorial economy. In short, this issue is not moot: the decision below continues to frustrate the

exercise of territorial powers of self-government specifically contemplated by the Congress.

Respectfully submitted,

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